

**UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD**

2009 MSPB 44

Docket No. DE-844E-08-0296-I-1

**Armida G. Chavez,
Appellant,**

v.

**Office of Personnel Management,
Agency.**

OPM Claim No. CSA8342599

March 26, 2009

Armida G. Chavez, Mora, New Mexico, pro se.

Neale N. Ainsfield, Washington, D.C., for the agency.

BEFORE

Neil A. G. McPhie, Chairman
Mary M. Rose, Vice Chairman

OPINION AND ORDER

¶1 The appellant timely filed a petition for review (PFR) of an initial decision (ID) that affirmed the final decision of the Office of Personnel Management (OPM) to deny her application for disability retirement under the Federal Employees' Retirement System (FERS). For the reasons set forth below, we GRANT the petition, REVERSE the ID and OPM's final decision, and ORDER OPM to award disability retirement benefits to the appellant.

BACKGROUND

¶2 The appellant began her employment with the U.S. Postal Service in January 1986. Appeal File (AF), Tab 6, Subtab II-E at 3. Her position of record was City Letter Carrier. *Id.*, Subtab II-D at 3; Hearing CD (HCD) (testimony of postal Branch Manager Christine Denysenko). The position entails sorting mail in sequence for delivery and carrying the mail on a delivery route. AF, Tab 6, Subtab II-D at 26; HCD (Denysenko). Prior to submitting her disability retirement application,¹ however, the appellant was working as a clerk at the retail window. HCD (Denysenko). She had begun performing non-carrier duties of various types for several years before her application, as the result of unspecified physical injuries that caused her to have lifting limitations. AF, Tab 6, Subtab II-D at 4; HCD (Denysenko). Her clerk duties were “make work,” and she was not reassigned to the City Letter Carrier position. HCD (Denysenko).

¶3 The appellant applied for FERS disability retirement on May 31, 2007, based on mental, rather than physical, impairments. AF, Tab 6, Subtab II-D at 1; *id.*, Subtab II-E at 9. OPM denied her application, finding that she was not disabled for useful and efficient service, *id.*, Subtab C at 1-5, and it subsequently issued a reconsideration decision sustaining the denial, *id.*, Subtab A at 1-4.

¶4 The appellant appealed to the Board’s Denver Field Office. AF, Tab 1. After a telephonic hearing, the administrative judge (AJ) assigned to the case affirmed OPM’s decision, finding that the appellant was disabled, but that she had not proven she could not be accommodated in her position. *Id.*, Tab 22 (ID) at 7-11.

¹ The appellant’s last day in a pay status was April 27, 2007. AF, Tab 6, Subtab II-E at 4. Thereafter, she was on leave without pay. *Id.*, Tab 12 at 12; HCD (Denysenko).

¶5 The appellant has filed a PFR asserting that she is dysfunctional due to stress and that she has proved her entitlement to disability retirement. Petition for Review File (RF), Tab 3 at 3, Tab 5 at 3.² OPM did not respond to the PFR.

ANALYSIS

¶6 In an appeal from an OPM decision denying a voluntary disability retirement application, the appellant bears the burden of proof by preponderant evidence. [5 C.F.R. 1201.56\(a\)\(2\)](#). To be eligible for a disability retirement annuity under FERS, an employee must show that: (1) She completed at least 18 months of creditable civilian service; (2) while employed in a position subject to FERS, she became disabled because of a medical condition, resulting in a deficiency in performance, conduct or attendance, or, if there is no such deficiency, the disabling medical condition is incompatible with either useful and efficient service or retention in the position; (3) the disabling medical condition is

² The appellant states in her petition that she could not perform the City Letter Carrier position after she received an on-the-job injury, and she provides workers' compensation reports from October 2002 regarding an injury affecting her right arm and hand. RF, Tab 3 at 7-9. She has not shown, however, that these documents were unavailable prior to the close of the record below; therefore, we have not considered them. Moreover, because only her psychiatric conditions were raised in the appellant's disability retirement application, we address only those conditions, not any physical limitations. See *Ballenger v. Office of Personnel Management*, [101 M.S.P.R. 138](#), ¶¶ 12-13 (2006) (the Board may not consider evidence relating to a medical condition that was never the subject of the disability retirement application in question).

With her petition, the appellant has also submitted a Notice of Removal effective October 14, 2008, for absence without leave, failure to provide medical documentation to support her continued absence from duty, and failure to report for an investigative interview regarding her absence. RF, Tab 3 at 11-12. The removal notice is new evidence, having been issued after the ID. However, because we find, for the reasons explained below, that the appellant is entitled to a disability retirement annuity based on other evidence, we do not find it necessary to address whether the appellant's removal requires application of the *Bruner* presumption. See *Bruner v. Office of Personnel Management*, [996 F.2d 290](#), 294 (Fed. Cir. 1993) (an employee's removal for physical inability to perform the essential functions of the position held constitutes prima facie evidence of entitlement to disability retirement); see also *Harris v. Office of Personnel Management*, [110 M.S.P.R. 249](#), ¶8 (2008) (depending on the circumstances, removal for attendance-related reasons can be tantamount to a removal for physical inability to perform).

expected to continue for at least one year from the date that the application for disability retirement benefits was filed; (4) accommodation of the disabling medical condition in the position held must be unreasonable; and (5) the employee did not decline a reasonable offer of reassignment to a vacant position. *Yoshimoto v. Office of Personnel Management*, [109 M.S.P.R. 86](#), ¶ 8 (2008); *Thorne v. Office of Personnel Management*, [105 M.S.P.R. 171](#), ¶ 5 (2007); see [5 U.S.C. § 8451\(a\)](#); [5 C.F.R. § 844.103\(a\)](#). The relevant position for determining whether an appellant is entitled to disability retirement is her position of record. *Ancheta v. Office of Personnel Management*, [92 M.S.P.R. 640](#), ¶ 15 (2002).

¶7 A determination on eligibility for disability retirement should take into account all competent medical evidence, including both objective clinical findings and qualified medical opinions based on the applicant's symptoms. See *Vanieken-Ryals v. Office of Personnel Management*, [508 F.3d 1034](#), 1041-42 (Fed. Cir. 2007) (citing *Chavez v. Office of Personnel Management*, [6 M.S.P.R. 404](#), 418-23 (1981)). In addition, the determination should include consideration of the applicant's own subjective evidence of disability and any other evidence of the effect of her condition on her ability to perform in the position she last occupied. See *Henderson v. Office of Personnel Management*, [109 M.S.P.R. 529](#), ¶ 12 (2008). Under FERS, the evidence must also show that the applicant did not decline an offer of reassignment. *Gooden v. Office of Personnel Management*, [471 F.3d 1275](#), 1281 (Fed. Cir. 2006); *Craig v. Office of Personnel Management*, [92 M.S.P.R. 449](#), ¶ 15 (2002). The burden is on the employing agency to consider whether the applicant qualifies for reassignment and, if so, to make an offer. *Gooden*, 471 F.3d at 1281 (citing [5 U.S.C. § 8451\(a\)\(2\)\(B\)](#) and [5 C.F.R. § 844.103\(b\)](#)).

¶8 In this case, the appellant has shown that, after more than 20 years of Postal Service employment, she became disabled due to psychiatric conditions that resulted in deficiencies in both performance and attendance. In support of her retirement application, she submitted to OPM a March 2007 report from her

treating psychiatrist, Dr. Brian Fitch, who diagnosed her as having a personality disorder and depression. IAF, Tab 6, Subtab II-D at 9.³ Dr. Fitch stated that the appellant's conditions interfered with her ability to interact appropriately with others at work, that she could not adapt to stress, and that she had "difficulty with any tasks requiring sustained concentration or ability to organize." *Id.* at 8. On appeal, the appellant produced a February 2008 letter from Dr. Fitch, stating that her condition had deteriorated despite numerous attempts to treat her with therapy and several medications. AF, Tab 12 at 18.⁴ Dr. Fitch stated that the appellant's prognosis was poor and that her condition would almost certainly worsen in the face of on-going work stress. *Id.* At the hearing, he testified that the appellant consistently presented as distraught and described conflict with staff and patrons at work. HCD. He also stated that her interactions with others and her cognitive functions, including "sequencing," were negatively affected in any setting involving stress or pressure. *Id.* In addition, he testified that the appellant had been compliant with treatment and had received some palliative relief, "but not to the degree that I would say she was significantly functional with regard to any sort of occupational endeavor." *Id.* He did not believe she was likely to improve. *Id.*

¶9 The appellant declined to testify at the hearing on her appeal, citing confusion and apprehension over what she might say. HCD. In her disability retirement application, however, she described herself as having constant anxiety, stress, panic attacks, depression, insomnia, difficulty concentrating, fear of going to work, and forgetfulness. AF, Tab 6, Subtab II-D at 1. The appellant also submitted a written statement on appeal, asserting that work stress and deaths in

³ The report indicated that the personality disorder was classified as Axis I, 301.9B, and the depressive disorder was Axis II, 311A. IAF, Tab 6, Subtab II-D at 9. Dr. Fitch clarified at the hearing that these are codes from the Diagnostic and Statistical Manual of Mental Disorders of the American Psychiatric Association. HCD.

⁴ Dr. Fitch began treating the appellant in February 2006. HCD. The appellant's medical records show, however, that she had been receiving treatment for depression and anxiety from others since 1993. AF, Tab 12 at 17.

her family had made her “very sick,” and that her mental problems prevented her from performing any job. *Id.*, Tab 12 at 13-14. She stated that she spent her days staring into space and pacing, and that sometimes she did not get out of bed. *Id.* at 14.

¶10 The Supervisor’s Statement accompanying the appellant’s disability retirement application stated that the appellant’s performance as a window clerk was less than satisfactory and that her attendance was unacceptable. AF, Tab 6, Subtab II-D at 3-4. The statement explained that the appellant became upset and emotionally distraught on the job, could not focus or concentrate, made many errors, and was absent more than she was present. *Id.* at 4. Her supervisor testified at the hearing that the appellant would become frustrated, agitated and stressed in interactions with customers, coworkers, and supervisors and, as a result, would have to leave work. HCD (testimony of Denysenko).

¶11 In light of the evidence discussed above, we find that the appellant has produced competent – and unrefuted – medical evidence establishing that her conditions preclude her from performing work involving concentration, organization, and interaction with others in any stressful environment. *See Vanieken-Ryals*, 508 F.3d at 1041 (“[A]n applicant may prevail based on medical evidence that . . . consists of a medical professional’s conclusive diagnosis, even if based primarily on his/her analysis of the applicant’s own descriptions of symptoms and other indicia of disability.”). Based on the evidence from both the appellant’s treating psychiatrist and her supervisor, and on her own subjective description of her inability to work,⁵ we find that the appellant has shown she is precluded from useful and efficient service or retention in her position.⁶ *See*

⁵ Although the appellant did not testify and relied on prior written statements, such statements on disability may be given great weight, especially where they are uncontradicted and there is no reason to discredit them. *See Rapp v. Office of Personnel Management*, [108 M.S.P.R. 674](#), ¶ 17 (2008).

⁶ We find the evidence probative although it primarily addressed the appellant’s *ad hoc* position, because the functional abilities discussed are relevant to both carrier and clerk duties.

Yoshimoto, [109 M.S.P.R. 86](#), ¶ 18 (a psychiatric condition exacerbated by job-related stress that prevents one from performing the duties of her position warrants disability retirement) (citing *Thorne*, [105 M.S.P.R. 171](#), ¶ 15); *Kimble v. Office of Personnel Management*, [102 M.S.P.R. 604](#), ¶ 14 (2006). Furthermore, the appellant was not offered and did not decline a reassignment.

¶12 We therefore agree with the AJ that the appellant has shown that she meets criteria (1), (2), (3) and (5) above for receiving a disability retirement annuity. Furthermore, OPM has not disputed these findings on PFR. Accordingly, disposition of the case turns on whether the record establishes that the appellant cannot be accommodated in her position of record, City Letter Carrier. We find that she has carried her burden of proof on this issue and that she is therefore entitled to a disability retirement annuity under FERS.

¶13 In order to obtain disability retirement, accommodation of an applicant's disabling medical condition must be unreasonable. *Gooden*, 471 F.3d at 1279 (citing [5 C.F.R. § 844.103\(a\)\(4\)](#)). "[A]ccommodation is defined as 'a reasonable adjustment made to an employee's job or work environment that enables the employee to perform *the duties of the position . . .*'" *Id.* (citing [5 C.F.R. § 844.102](#)). That is, "accommodation requires adjustments that allow an employee to continue to perform her official position." *Id.* Accommodations may include, e.g., modifications of the worksite, schedule adjustments, job restructuring, and changes in equipment. [5 C.F.R. § 844.102](#). If there is an accommodation that enables the employee to perform the critical or essential duties of her position of record, the employee may not receive disability retirement. *Bell v. Office of Personnel Management*, [99 M.S.P.R. 133](#), ¶ 15 (2005). A modified position or set of *ad hoc* duties in the Postal Service that does not include the core functions of the employee's existing position, and that is created in an attempt to provide work within the employee's medical restrictions, does not constitute an accommodation in the position of record. See *Ancheta v. Office of Personnel Management*, [95 M.S.P.R. 343](#) (2003).

¶14 In this case, the Postal Service certified that accommodation of the appellant was not possible, due to the severity of her condition and the requirements of her position. AF, Tab 6, Subtab II-D at 24. The AJ held that, because the Postal Service certification was the only record evidence directly addressing accommodation in the appellant's position of record, the appellant did not carry her burden to prove, by a preponderance of the evidence, that she could not be accommodated as a City Letter Carrier. ID at 10. We note, however, that the certification is not challenged by OPM. Moreover, the record supports the conclusion that accommodation in the position of City Letter Carrier would be unreasonable. There is no indication of any job modification that would permit the appellant to perform the essential functions of her job. The evidence from her psychiatrist and supervisor, as well as the appellant's own statements, shows that she cannot be accommodated due to her inability to concentrate, organize, interact with others, or cope with any stress. Further, her psychiatrist has stated that her conditions are not expected to improve and would in fact worsen if she continued to work.

¶15 Where an agency certification that accommodation is unavailable is unrebutted and the record supports the conclusion that accommodation would not be possible, the Board has held that this criterion for obtaining disability retirement is met. *See Henderson*, [109 M.S.P.R. 529](#), ¶¶ 20-21; *Dussault v. Office of Personnel Management*, [103 M.S.P.R. 92](#), ¶ 17 (2006). Accordingly, we find that the AJ erred in finding that the appellant did not prove by preponderant evidence that she could not be accommodated in her position of record. The appellant has therefore met all the criteria for disability retirement under FERS and is entitled to a disability retirement annuity.

ORDER

- ¶16 We ORDER the Office of Personnel Management (OPM) to award the appellant a disability retirement annuity. OPM must complete this action no later than 20 days after the date of this decision.
- ¶17 We also ORDER OPM to tell the appellant promptly in writing when it believes it has fully carried out the Board's Order and to describe the actions it took to carry out the Board's Order. We ORDER the appellant to provide all necessary information OPM requests to help it carry out the Board's Order. The appellant, if not notified, should ask OPM about its progress. See [5 C.F.R. § 1201.181\(b\)](#).
- ¶18 No later than 30 days after OPM tells the appellant it has fully carried out the Board's Order, the appellant may file a petition for enforcement with the office that issued the initial decision on this appeal if the appellant believes that OPM did not fully carry out the Board's Order. The petition should contain specific reasons why the appellant believes OPM has not fully carried out the Board's Order, and should include the dates and results of any communications with OPM. See [5 C.F.R. § 1201.182\(a\)](#).
- ¶19 This is the final decision of the Merit Systems Protection Board in this appeal. Title 5 of the Code of Federal Regulations, section 1201.113(c) ([5 C.F.R. § 1201.113\(c\)](#)).

NOTICE TO THE APPELLANT REGARDING YOUR RIGHT TO REQUEST ATTORNEY FEES AND COSTS

You may be entitled to be paid by the agency for your reasonable attorney fees and costs. To be paid, you must meet the requirements set out at Title 5 of the United States Code (5 U.S.C.), sections 7701(g), 1221(g), or 1214(g). The regulations may be found at [5 C.F.R. §§ 1201.201](#), 1201.202 and 1201.203. If you believe you meet these criteria, you must file a motion for attorney fees WITHIN 60 CALENDAR DAYS OF THE DATE OF THIS DECISION. You

must file your attorney fees motion with the office that issued the initial decision on your appeal.

NOTICE TO THE APPELLANT REGARDING
YOUR FURTHER REVIEW RIGHTS

You have the right to request the United States Court of Appeals for the Federal Circuit to review this final decision. You must submit your request to the court at the following address:

United States Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, DC 20439

The court must receive your request for review no later than 60 calendar days after your receipt of this order. If you have a representative in this case and your representative receives this order before you do, then you must file with the court no later than 60 calendar days after receipt by your representative. If you choose to file, be very careful to file on time. The court has held that normally it does not have the authority to waive this statutory deadline and that filings that do not comply with the deadline must be dismissed. *See Pinat v. Office of Personnel Management*, [931 F.2d 1544](#) (Fed. Cir. 1991).

If you need further information about your right to appeal this decision to court, you should refer to the federal law that gives you this right. It is found in Title 5 of the United States Code, section 7703 ([5 U.S.C. § 7703](#)). You may read this law, as well as review the Board's regulations and other related material, at our website, <http://www.mspb.gov>. Additional information is available at the court's website, www.cafc.uscourts.gov. Of particular relevance is the court's "Guide for Pro Se Petitioners and Appellants," which is contained within the court's Rules of Practice, and Forms 5, 6, and 11.

FOR THE BOARD:

William D. Spencer
Clerk of the Board
Washington, D.C.